

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
)	
MARITIME COMMUNICATIONS/LAND)	EB Docket No. 11-71
MOBILE, LLC)	File No. EB-09-IH-1751
	)	FRN: 0013587779
Participant in Auction No. 61 and Licensee of Various)	
Authorizations in the Wireless Radio Services)	
Applicant for Modification of Various Authorizations)	
in the Wireless Radio Services;)	
)	
Applicant with ENCANA OIL AND GAS (USA), INC.;	)	Application File Nos.
DUQUESNE LIGHT COMPANY; DCP	)	0004030479, 0004144435,
MIDSTREAM, LP; JACKSON COUNTY RURAL	)	0004193028, 0004193328,
MEMBERSHIP ELECTRIC COOPERATIVE; PUGET	)	0004354053, 0004309872,
SOUND ENERGY, INC.; ENBRIDGE ENERGY	)	0004310060, 0004314903,
COMPANY, INC.; INTERSTATE POWER AND	)	0004315013, 0004430505,
LIGHT COMPANY; WISCONSIN POWER AND	)	0004417199, 0004419431,
LIGHT COMPANY; DIXIE ELECTRIC	)	0004422320, 0004422329,
MEMBERSHIP CORPORATION, INC.; ATLAS	)	0004507921, 0004153701,
PIPELINE—MID CONTINENT, LLC; DENTON	)	0004526264, 0004636537,
COUNTY ELECTRIC COOPERATIVE, INC., DBA	)	and 0004604962
COSERV ELECTRIC; AND SOUTHERN)	
CALIFORNIA REGIONAL RAIL AUTHORITY)	
)	
For Commission Consent to the Assignment of Various)	
Authorizations in the Wireless Radio Services)	

To: Marlene H. Dortch, Secretary

Attn: The Honorable Richard L. Sippel, Chief Administrative Law Judge

REPLY TO ENFORCEMENT BUREAU'S OBJECTION
TO MARITIME'S FIRST DRAFT GLOSSARY

Maritime Communications/Land Mobile, LLC (Maritime), hereby tenders this reply to the *Enforcement Bureau's Objection to Maritime's First Draft Glossary* ("Objection"). Maritime is concurrently filing a motion for leave to submit this.

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ORIGINAL

The Bureau takes issue with the following proposed definitions: (a) Known (or Not Known) to be Operating (or Not Operating), Operational; (b) Not Operating (including Temporarily and Permanently Not Operating); and (c) Operating or Operational. Maritime offers the following response to and comments on the Bureau's objections in the hope of clarification and further elucidation.

Known/Not-Known

Maritime offers a definition of "known" and "not known" to clarify what it meant by its prior use of these terms in discovery responses and other submissions. Maritime's proposed definition thus explains:

Although not officially defined by the Commission in its regulations or otherwise, these or similar terms have been used by Maritime in its discovery responses to convey, as a factual matter, the status of its incumbent facilities. Maritime has designated a facility as operational only if it knows or has a reasonable basis for believing that it is currently operational. Similarly, Maritime has designated a facility as non-operational or temporarily suspended if it knows that the facility is not currently operational. Finally, where Maritime does not know the current status of a facility, it has candidly so stated. See also Constructed and Operating or Operational.

The Bureau would change the operative wording from "knows or has a reasonable basis for believing" to "knows, based on reliable and substantial evidence," while still characterizing these as words "used [in the past] by Maritime ... to convey, as a factual matter, the known status of its incumbent facilities." *Objection* at p. 3. The Bureau's proposed revision substantially changes the meaning of the words. Whether it is necessary to adopt and apply prospectively formal definitions of "known" or "unknown" is debatable. But a parsed and legalistic terminology may not be applied retroactively to ascribe a particular meaning to Maritime's past statements.

Not Operating

The Bureau argues that Maritime's inclusion of the words "temporarily" or "permanently" in this definition goes to "questions of law which should be reserved for the Presiding Judge after an analysis of the Commission's precedent in view of the facts of this particular case." But the Bureau's proposed alternative definition of "Not Operating" is no less a legal conclusion. By its proposed alternative definition, the Bureau wants the judge to effectively codify a rule defining a station to be "operating" only if it is "on-the-air, transmitting a signal, i.e., exchanging two-way communications traffic." *Objection* at p. 4. Whether a station is "transmitting a signal" is certainly a factual question, but whether "transmitting a signal" is a prerequisite to being deemed "in operation" or "operating" for regulatory purposes, including Section 1.955(a)(3) of the Rules, is a question of law.

The Bureau's stubborn demand for the "on the air, transmitting a signal" formulation is not only legally problematic, it is factually absurd. With the possible exception of certain digital formats not here relevant, *no* transmitter in *any* two-way or paging mobile radio service, no matter how active operations may be, is always "on the air, transmitting a signal." Lest it be thought that Maritime is just quibbling or nitpicking on this point, one need only refer to the Bureau's analogy between landline telephone service and the AMTS. The Bureau says a telephone is "operational" if it is "plugged into the wall jack [and] capable of placing or receiving calls," but that it is "'operating' only when a call has been placed or received and a two-way conversation is underway." *Objection* at n.2. By the Bureau's definition, a telephone is deemed "not operating" any time it is hung up. Applied to the AMTS, this leads to an absurd and impossible result. Assuming it were possible to accurately state, by that definition, whether a particular station is in operation, the answer would be subject to frequent change from moment to moment.

There is no regulation or precedent supporting the Commission's proposed definition. Indeed, the Commission's narrow and restrictive definition is contrary to applicable Commission rulings and statements. Even when a station is actively serving end user customers, it is not always on the air or transmitting a signal. And there is no precedent or other authority holding that a transmitter not currently serving end user customers, but constructed and capable of doing so, is not "in operation" or "in service" for regulatory purposes.

The Bureau is playing word games for some tactical reason. To be sure, the ultimate questions are issues of law that the Presiding Judge will decide based on the facts. And regardless of the terminology, the basic facts have been on the record for quite some time. Maritime has candidly stated that it has not provided AMTS service directly to end users from any of its incumbent stations since 2007, but that it does have spectrum lessees as to certain specific incumbent stations. Maritime has further explained that, notwithstanding this lack of end user customers, it did not voluntarily remove facilities from or render inoperative any incumbent station. Maritime also explained that some of the incumbent stations are nonetheless non-operational, and it has disclosed the reasons for and dates of such changes in status. Thus, Maritime has disclosed the factual status of the facilities. But Maritime has properly resisted being locked into any terminology that suggests a legal conclusion for purposes of Section 1.955(a)(3).

Operating/Operational

The Bureau's primary objection to the draft glossary is that "Maritime has failed to differentiate between what it means for a facility to be operating and what it means for a facility to be operational, i.e., capable of operating." *Objection* at p. 2. To the extent there is a need for such a distinction as a factual matter, Maritime has disclosed the relevant facts, as discussed in the preceding paragraph. But as a matter of law, there is no meaningful regulatory distinction.

A station actively serving end user customers and a station that is constructed and capable of so doing but that currently has no customers are both “in operation” or “in service” for purposes of Section 1.955(a)(3) of the Rules. In some radio services, the Commission has defined that, in order to be deemed “in operation” for purposes of timely construction and permanent discontinuance provisions, a station must be constructed and providing service to a minimum number of mobile units. See, e.g., 47 C.F.R. § 90.155(c) (service to at least one mobile unit required to be deemed constructed and “in operation”). There is *no* such requirement in the AMTS. See, also, *Mobex Network Services, LLC* (DA 03-2065), 18 FCC Rcd 12309, 12311 ¶ 8 (WTB 2003) (“Although some Commission-licensed services require a certain loading level as a condition of continued licensing, AMTS is not one of them.”).¹

Fill-In Transmitter & Spectrum Lease

The Bureau does not object to Maritime’s proposed definitions of “Fill-In Transmitter” or “Spectrum Lease,” but its discussion of other definitions fails to properly accommodate these concepts. At the end of its proposed alternative definition of “Operating,” the Bureau includes the following statement:

Whether a facility is operating is determined with respect to the licensed site. Operation of fill-in sites does not render operative an inactive licensed transmitter site. See *Mobex Network Services, LLC, Memorandum Opinion and Order*, 25 FCC Rcd 3390, ¶ 10, n.48 (2010).

This is not entirely accurate, may be misleading, and the cited case is taken out of context. A distinction must be made between fill-in sites established by the AMTS licensee for its own operations under the license, versus fill-in sites established by third party users pursuant to a

¹ The Bureau acknowledges that an AMTS licensee need not be actively serving end user subscribers to be deemed constructed and operating, see *Objection* at p. 5, but the Bureau seemingly fails to grasp that the logical conclusion that an “operating” station does not have to be continuously “on the air,” “transmitting a signal,” or “exchanging two-way communications traffic.”

spectrum lease under the Commission's Secondary Market Policies.² In the latter case, the licensee leases spectrum capacity to a third party as an alternative to providing service itself directly to end user subscribers. In most cases, the service requirements of the spectrum lessee are such that it establishes one or more fill-in sites within the footprint of the licensee's authorized location. Moreover, during the term of the spectrum lease, the AMTS licensee typically cannot operate from its licensed transmitter location, lest it cause interference to its spectrum lessee. The Commission has expressly found that such arrangements serve the public interest by making more efficient use of the spectrum.³

In these circumstances, the licensed station cannot be considered to have automatically cancelled on either of two theories. First, the Commission has clearly made provision for leasing spectrum capacity as an alternative to serving end users directly, so the provision of the lease is itself an "operation" and a provision of "service" pursuant to the license. Second, and even if that were not true, by its very nature the cessation of operations from the licensed transmitter site is temporary and not permanent. In leasing the spectrum rather than assigning the authorization, the licensee preserves the right to resume operations at the licensed site at the end of the lease term.

The Bureau's assertion that "[o]peration of fill-in sites does not render operative an inactive licensed transmitter," must be clarified, and the opinion cited by the Bureau, *Mobex Network Services, LLC* (FCC 10-39), 25 FCC Rcd 3390 (2010) (hereinafter referred to as the "*Chicago Ruling*"), must be understood in context. In the *Chicago Ruling* the Commission addressed the situation in which an AMTS licensee was authorized for a location at the Hancock

² See, generally, *Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets*, WT Docket No. 00-230, *Policy Statement*, 15 FCC Rcd 24178 (2000); *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003); *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004).

³ *Id.*

Building in Chicago but was operating from a fill-in site at the nearby Sears Tower. A key point that the Bureau's reference to *Chicago Ruling* omits is that the Commission first held that the authorization for the Hancock site had automatically terminated due to "permanent discontinuance of operation." 25 FCC Rcd 3395. The Commission then noted that the operation of a fill-in site at Sears Tower did not "save" the authorized site at Hancock. *Id.* at n.48.⁴

The principal underlying the *Chicago Ruling* is simply that an AMTS licensee's operation of an unlicensed fill-in site is authorized only under the auspices of an effective authorization for licensed site. The licensed site provides authority for the fill-in site, not vice versa. But the *Chicago Ruling* does *not* hold that a fill-in site is invalid when operation at the licensed site has been only temporarily discontinued.⁵ The *Chicago Ruling* also does not address the operation of fill-in sites by a spectrum licensee, where the lessee's operation is in lieu of the licensee/lessor providing service directly to end users via the licensed site.

⁴ It is noted, moreover, that the "Chicago" decision is not a final. Maritime timely requested reconsideration of the decision, arguing among other things, the lack of an objective standard in the AMTS as to what constitutes permanent discontinuance. Maritime's position in this regard has been confirmed and strengthened by the recent ruling of the United States Supreme Court in *FCC v. Fox Television Stations*, 132 S. Ct. 2307 (2012). The Court there explained: "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. ... First, ... regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." 132 S. Ct. 2317 (citations omitted).

⁵ The mere fact that a licensed transmitter is off the air or out of service for an extended period of time does not, in itself, constitute permanent discontinuance for purposes of Section 1.955 of the Rules. *See, Northeast Utilities Service Co.* (DA 09-643), 24 FCC Rcd 3310, 3313-3315 (WTB MSD 2009). In that case, an authorization was deemed not to have terminated where there had been no operations at the licensed site for a period of more than seven years, but there were operations at a fill-in site. In so holding the Wireless Telecommunications Bureau was fully aware of the rubric that "whether a station is in operation is determined with respect to the licensed facility" and that "operation of fill-in sites does not render operative an inactive licensed transmitter." *Id.* at n.39. But it was also recognized that temporary discontinuance of operation does not result in cancellation of the licensed location or invalidation of the fill-in site. In fact, *Northeast Utilities* acknowledges that the operation of a fill-in transmitter may, depending of the circumstances, be evidence that operation at the licensed site has *not* been permanently discontinued. 23 FCC Rcd at 3312.

Respectfully Submitted,

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